

MARK E. STUDARD,
Plaintiff,
v.
MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

No. CV-09-0331-CI
ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 19.) Attorney Jeffrey Schwab represents Mark E. Studard (Plaintiff); Special Assistant United States Attorney Benjamin Groebner represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

Plaintiff filed for disability insurance benefits (DIB) under Title II of the Social Security Act (Act), March 15, 2004. (Tr. 17, 111.) He alleged disability due to injuries to his back, right hip, knees, and left foot with an onset date of April 1999. (Tr. 90.) His claim was denied initially and on reconsideration. (Tr. 29-33.)

1 Plaintiff requested a hearing before an administrative law judge
2 (ALJ), which was held on November 14, 2006, before ALJ R.J. Payne.
3 (Tr. 411-39.) A supplemental hearing was held on March 23, 2007.
4 (Tr. 440-482.) Plaintiff was represented by counsel at both
5 hearings. Medical expert Anthony Francis, M.D., testified at the
6 November hearing, and Plaintiff and vocational expert Deborah
7 LaPoint testified at the March hearing. The ALJ denied benefits on
8 April 10, 2007, and the Appeals Council denied review. (Tr. 13-26,
9 7-10.) The instant matter is before this court pursuant to 42
10 U.S.C. § 405(g).

11 STANDARD OF REVIEW

12 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
13 court set out the standard of review:

14 The decision of the Commissioner may be reversed only
15 if it is not supported by substantial evidence or if it is
16 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
17 1097 (9th Cir. 1999). Substantial evidence is defined as
18 being more than a mere scintilla, but less than a
19 preponderance. *Id.* at 1098. Put another way, substantial
20 evidence is such relevant evidence as a reasonable mind
21 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
22 evidence is susceptible to more than one rational
23 interpretation, the court may not substitute its judgment
24 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
25 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,
599 (9th Cir. 1999).

26 The ALJ is responsible for determining credibility,
27 resolving conflicts in medical testimony, and resolving
28 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

26 It is the role of the trier of fact, not this court, to resolve
27 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
28

1 supports more than one rational interpretation, the court may not
2 substitute its judgment for that of the Commissioner. *Tackett*, 180
3 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
4 Nevertheless, a decision supported by substantial evidence will
5 still be set aside if the proper legal standards were not applied in
6 weighing the evidence and making the decision. *Browner v. Secretary*
7 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
8 there is substantial evidence to support the administrative
9 findings, or if there is conflicting evidence that will support a
10 finding of either disability or non-disability, the finding of the
11 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
12 1230 (9th Cir. 1987).

13 SEQUENTIAL PROCESS

14 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
15 requirements necessary to establish disability:

16 Under the Social Security Act, individuals who are
17 "under a disability" are eligible to receive benefits. 42
18 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
19 medically determinable physical or mental impairment"
20 which prevents one from engaging "in any substantial
21 gainful activity" and is expected to result in death or
22 last "for a continuous period of not less than 12 months."
23 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
24 from "anatomical, physiological, or psychological
25 abnormalities which are demonstrable by medically
26 acceptable clinical and laboratory diagnostic techniques."
27 42 U.S.C. § 423(d)(3). The Act also provides that a
28 claimant will be eligible for benefits only if his
impairments "are of such severity that he is not only
unable to do his previous work but cannot, considering his
age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

The Commissioner has established a five-step sequential

1 evaluation process for determining whether a person is disabled. 20
2 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
3 137, 140-42 (1987). In steps one through four, the burden of proof
4 rests upon the claimant to establish a prima facie case of
5 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
6 920, 921 (9th Cir. 1971). This burden is met once a claimant
7 establishes that a physical or mental impairment prevents the
8 claimant from engaging in a previous occupation. 20 C.F.R. §§
9 404.1520(a), 416.920(a). If a claimant cannot do past relevant
10 work, the ALJ proceeds to step five, and the burden shifts to the
11 Commissioner to show that (1) the claimant can make an adjustment to
12 other work; and (2) specific jobs exist in the national economy
13 which claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v),
14 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497-98 (9th Cir.
15 1984).

16 STATEMENT OF THE CASE

17 The facts of the case are set forth in detail in the transcript
18 of proceedings and are briefly summarized here. At the time of the
19 hearing, Plaintiff was 38 years old. He testified he attended
20 special education classes up until sixth grade when he left school.
21 He also testified that he did not obtain a high school equivalency
22 degree. (Tr. 444-46.) He reported he was married, then divorced for
23 three years, and remarried his spouse in 2002. (Tr. 457-58.)
24 Plaintiff has past work experience as a material handler, a janitor,
25 a home attendant, a forklift operator, a farm worker and a tractor
26 operator. (Tr. 477.) He testified he has been unable to work since
27 a job-related accident in 1991, when he was run over by a tractor.
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1 (Tr. 452.) The tractor crushed his left foot, and shattered his
2 right femur bone to his knee. (*Id.*) Plaintiff gained 170 pounds
3 from the time of the accident. (Tr. 454.) He reported he has not
4 been able to work since 1999 due to pain from his injuries.

5 **ADMINISTRATIVE DECISION**

6 ALJ Payne first found Plaintiff met the insured status
7 requirements for DIB through March 31, 2002. (Tr. 19.) At step one
8 of the sequential evaluation process, the ALJ found Plaintiff had
9 not engaged in substantial gainful activity since the alleged onset
10 date of April 17 or December 31, 1999. (*Id.*) At step two, he found
11 that Plaintiff had following severe impairments: "history of
12 fractures to the right femur and left foot in 1991 requiring
13 hardware placement and subsequent removal; history of arthroscopic
14 surgery for torn medial meniscus of the right knee in January 2003
15 and left knee in May 2005." (Tr. 19-20.) He also found since 2005,
16 Plaintiff has had the additional severe impairments of headaches;
17 gastroesophageal reflux; complaints of upper extremity dysfunction;
18 obstructive sleep apnea with daytime hypersomnia; obesity; a
19 depressive disorder; a reading disorder; post traumatic stress
20 disorder; a chronic pain disorder; and a history of amphetamine
21 abuse in full remission for 16 years. (Tr. 20.) At step three, the
22 ALJ found prior to October 1, 2002, Plaintiff did not have an
23 impairment or combination of impairments that met or equaled an
24 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1
25 (Listings). He determined that prior to October 1, 2002, Plaintiff
26 had the residual functional capacity (RFC) for sedentary level work
27 activities. He found there was no evidence in the record that
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1 Plaintiff was under medical care prior to October 1, 2002, a lack of
2 medical evidence that was confirmed by Plaintiff, who stated he was
3 not under medical care and did not seek medical treatment during the
4 period between 1993 and 2002. (Tr. 20, 22.) Based on medical
5 expert testimony, the ALJ concluded that, from April 17, 1999, until
6 October 1, 2002, Plaintiff was capable of at least a sedentary level
7 of work, and there were jobs in significant numbers Plaintiff could
8 have performed during that time. The ALJ concluded Plaintiff was
9 not disabled under the Social Security Act from the alleged onset
10 date until October 2002. (Tr. 23, 24-25.) However, the ALJ
11 concurred with the medical expert that Plaintiff's medically
12 determinable impairments after October 2002 met or equaled Listing
13 1.02 for major dysfunction of a joint. (Tr. 23.) The ALJ concluded
14 Plaintiff was disabled as defined by the Social Security Act after
15 October 2002 and eligible for SSI. (Tr. 26.)

16 ISSUES

17 The question is whether the ALJ's decision is supported by
18 substantial evidence and free of legal error. Plaintiff argues the
19 ALJ erred when he found Plaintiff was not disabled prior to his date
20 of last insured,¹ but became disabled on October 1, 2002. (Ct. Rec.
21 14; Tr. 26.) Defendant responds the ALJ did not err in this finding
22 because there is no medical evidence pertaining to the period
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24 ¹ In his memorandum in support of his Motion for Summary
25 Judgment, Plaintiff indicates his date of last insured was December
26 31, 2001. (Ct. Rec. 14 at 6.) However, the record indicates the
27 date of last insured for DIB purposes is March 31, 2002. (Tr. 17,
28 26, 69, 111.)

1 between the alleged onset date in 1999 and October 2002. He asserts
2 disability cannot be established based on Plaintiff's statements
3 alone. (Ct. Rec. 20 at 8-9.)

4 DISCUSSION

5 Disability is defined by the Social Security regulations as
6 "the inability to do any substantial gainful activity by reason of
7 any medically determinable physical or mental impairment which can
8 be expected to result in death or which has lasted or can be
9 expected to last for a continuous period of not less than 12
10 months." 20 C.F.R. § 404.1505(a). To be eligible for disability
11 insurance benefits, a claimant must prove the existence of a
12 physical or mental impairment by providing medical evidence
13 consisting of signs, symptoms, and laboratory findings; the
14 claimant's own statement of symptoms alone will not suffice. 20
15 C.F.R. § 404.1508, .1528. An impairment must result from
16 "anatomical, physiological or psychological abnormalities" which can
17 be shown by "medically acceptable clinical and laboratory diagnostic
18 techniques." 20 C.F.R. § 404.1528. However, the fact that a
19 medically determinable condition exists does not automatically mean
20 the symptoms are "severe," or "disabling" as defined by the Social
21 Security Regulations (Regulations). *See, e.g., Edlund*, 253 F.3d at
22 1159-60; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Key v.*
23 *Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

24 Regardless of a claimant's credibility, and how many symptoms
25 are alleged (or how genuine the complaints may be), "the existence
26 of a medically determinable physical or mental impairment cannot be
27 established in the absence of objective medical abnormalities."
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1 *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005)(quoting
2 *Social Security Ruling (SSR)* 96-4p).²

3 Once a medically determinable impairment is established, and it
4 is found to be disabling, an onset date must be established. The
5 onset date represents the date upon which Plaintiff is disabled and,
6 therefore, eligible for benefits. Determining the onset date is
7 especially critical in DIB cases, because it may affect whether
8 Plaintiff is eligible for past earned benefits, and if so, the
9 amount he can be paid. See *SSR* 83-20.

10 Where disability is caused by a distinct trauma, and medical
11 documentation is available to establish the date of trauma and
12 severity of impairment, the Commissioner may base a finding of onset
13 on evidence from acceptable medical sources. *Id.* However, in
14 progressive diseases, such as degenerative disk disease, the date of
15 onset is frequently unclear, and inferences must be made to
16 establish this critical finding. *Id.*

17 Here, it is undisputed that medical evidence does not establish
18 a precise date of onset; therefore, "informed inferences" must be
19 made by a qualified medical expert. *Morgan*, 945 F.2d at 1082-83.
20 The ALJ must create a record by calling a medical expert to infer an
21 onset date. The medical expert's testimony constitutes substantial

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23 ² Under the case law, deference is accorded to the
24 Commissioner's interpretation of the Social Security Act found in
25 the agency's Social Security Rulings, "as long as they are
26 consistent with the Social Security Act and regulations." *Ukolov*,
27 420 F.3d at 1005 n.2 (citation omitted).

1 evidence to support the Commissioner's onset determination. See
2 *Armstrong v. Commissioner of the Social Sec. Admin.*, 160 F.3d 587,
3 589 (9th Cir. 1998).

4 Plaintiff appears to argue his statements regarding symptoms
5 experienced between 1999 and March 31, 2002, combined with the
6 testimony of Dr. Francis, should be sufficient to support a finding
7 of disability that he became disabled before his date of last
8 insured. (Ct. Rec. 14 at 7.) However, Plaintiff concedes there are
9 no medical records for the period between his alleged onset date and
10 October 1, 2002. He also concedes he neither required medical care
11 nor sought medical treatment during that time. (Tr. 23, 458-59; Ct.
12 Rec. 14 at 7.) Rather, he argues "some reasonable degree of
13 extrapolation" could be made from Dr. Francis' testimony and medical
14 records relating to a period after October 2002. This argument is
15 not persuasive.

16 As testified by Dr. Francis, the first unambiguous evidence of
17 a medically determinable impairment does not occur until October
18 2002. Dr. Francis explicitly testified that there was no evidence
19 to establish when Plaintiff met Listing 1.02. (Tr. 427.) Therefore,
20 it was necessary for Dr. Francis to infer an onset date based on the
21 evidence available. Plaintiff posits that Dr. Francis's testimony
22 that degenerative arthritic changes "didn't just occur over night,"
23 is sufficient to infer disability. (Ct. Rec. 14 at 8; Tr. 429.)
24 There is nothing in the record or Dr. Francis's testimony to support
25 this argument. Even if the degenerative joint disease existed prior
26 to October 2002, an "informed inference" of severity meeting or
27 equaling Listing 1.02 must be based on medical evidence as well as
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1 a claimant's description of his pain and symptoms. SSR 83-20.
2 However, "the medical evidence serves as the primary element in the
3 onset determination." *McClanahan v. Commissioner of Social*
4 *Security*, 474 F.3d 830, 834 (6th Cir. 2006) (quoting SSR 83-20). A
5 claimant's allegations are probative in determining onset "only if
6 [they are] consistent with the severity of the condition(s) shown by
7 the medical evidence." *Id.*

8 The record shows that Dr. Francis declined to opine regarding
9 the severity of degenerative joint disease during the period prior
10 to October 2, 2002, due to the lack of medical evidence. However,
11 after reviewing the medical evidence, he testified a radiology
12 report dated January 21, 2003, of the right knee was sufficient to
13 meet the requirements of Listing 1.02. (Tr. 431.) The ALJ
14 correctly found that, prior to October 1, 2002, there is no medical
15 evidence to establish an onset of disability. (Tr. 23, 429-30,
16 432.)

17 Plaintiff provides no legal authority for his assertion that an
18 onset date can be extrapolated or based on speculation. Although
19 the Social Security Act is to be construed liberally in favor of a
20 claimant, the Social Security Act, the Commissioner's regulations
21 and interpretative rulings, and the case law are clear that
22 objective medical evidence is required to establish disability. 42
23 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505; *Ukolov*, 420 F.3d at
24 1005-06; SSR 96-4p; SSR 83-20. Regardless of how many symptoms an
25 individual alleges, or how genuine his complaints may appear to be,
26 without the requisite evidence of a medically determinable
27 impairment during the relevant period, disability cannot be
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1 established. See SSR 96-4p.

2 The ALJ properly obtained medical expert testimony to infer
3 disability. Plaintiff has the burden to prove disability before his
4 insured status expired. *Armstrong*, 160 F.3d at 590. Plaintiff did
5 not meet his burden to present evidence of a medically determinable
6 impairment that prevented him from performing substantial gainful
7 employment prior to the expiration of his insured status on March
8 31, 2002. ALJ Payne's determination that Plaintiff was not disabled
9 prior to October 2002, is a rational interpretation of the evidence.
10 The ALJ did not err in relying on Dr. Francis' testimony that
11 without objective medical evidence, an onset date cannot be inferred
12 before October 2002. (Tr. 23.) Where, as here, substantial
13 evidence supports the Commissioner's determination, it may not be
14 disturbed. Accordingly,

15 **IT IS ORDERED:**

16 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
17 **DENIED;**

18 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is
19 **GRANTED;**

20 The District Court Executive is directed to file this Order and
21 provide a copy to counsel for Plaintiff and Defendant. The file
22 shall be closed and judgment entered for Defendant.

23 DATED February 4, 2011.

24
25 S/ CYNTHIA IMBROGNO
26 UNITED STATES MAGISTRATE JUDGE
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